EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Jack Verburg operating Sicamous Bobcat and Excavating
("Verburg")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/424

DATE OF DECISION: September 25, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Jack Verburg operating Sicamous Bobcat and Excavating ("Verburg") of a Determination which was issued on June 9, 1998 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director found Verburg had contravened Sections 17(1), 40(1) and 40(2) in respect of the employment of Rupert G. Davy ("Davy") and, pursuant to Section 79 of the *Act*, ordered Verburg to pay an amount of $4468.69. The Director also assessed a **zero dollar ($0.00)** penalty in respect of the contravention.

Verburg says the Determination is wrong and gives two reasons to support his position. First, he says that Davy was told of the conditions of employment at the time he was hired and agreed with them. Second, he says the Determination refers to "indications of documents pertaining to many points" but none were forwarded to Verburg at any time during the investigation.

ISSUES TO BE DECIDED

The issue in this case is whether Verburg has established any ground for appeal.

FACTS

There does not appear to be any substantial dispute on the facts.

The complaint made by Davy alleged he had been employed by Verburg for a period commencing sometime in 1994 and ending November 8, 1997. Davy says that when he was hired he was told by Verburg that he would not be paid overtime. The issue of payment for overtime was revisited by Davy with Verburg on at least one occasion after that time.

Davy says he kept track of his hours worked on a daily basis and submitted these to the bookkeeper for Verburg, Sharon Krahn, on a semi-monthly basis. Davy was employed by Verburg as an equipment operator, operating heavy construction equipment owned by Verburg.

A series of communications, both written and verbal, passed between the Director and Verburg, or his representative, Peter Jovan ("Jovan"), commencing with notice to Verburg of the complaint on February 17, 1998 and ending April 29, 1998, and included a

Demand for Employer Records requiring production of payroll records relating to the employment of Davy.

Throughout the course of the communication, Jovan asked the Director on a number of occasions for "proof of your allegation against my client". Jovan also indicated, in one letter, that Verburg had done a self audit and no violations of "law or rights". Apart from notification of the complaint as being a claim for overtime and annual vacation pay, no information was given to Verburg or Jovan by the Director. In the Determination, the Director states:

> The Employer was notified of the Complaint, and given numerous opportunities to respond to letters, telephone calls and a formal "Demand for Employer Records" as provided for by Section 85 of the Act.

ANALYSIS

The first issue of this appeal is without foundation. Section 4 of the *Act* effectively nullifies any agreement that provides compensation and conditions that are less than the minimum requirements of the *Act*:

> *4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

The exceptions contained in Sections 43, 49, 61 and 69 do not apply in this case.

The second ground of appeal is somewhat more difficult, but the result is the same. Section 77 of the *Act* says:

> *77. If an investigation is conducted, the director must make reasonable efforts to give person under investigation an opportunity to respond.*

That legislative requirement is the manifestation of one of the statutory objectives of the *Act*, found in Section 2, to *"provide fair and efficient procedures for resolving disputes over the application and operation of this Act"*.

In *Insulpro Industries Ltd. and Insulpro (Hub City) Ltd*., BC EST #D405/98, the Tribunal noted that while at all times the Director is required to afford the parties involved in a proceeding under the *Act*, including an investigation, a measure of procedural protection, the level of procedural protection required is flexible and will depend on the function being exercised by the Director at any given time:

> The Branch is not unique among administrative bodies. As noted above, the Director exercises functions which, if being characterized, would include legislative, investigative and judicial decision making processes. In that context there is no specific or set level of procedural protection that must accompany a function of the Director. The decision of *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 stresses that the attributes of natural justice that apply in a given context will vary according to the character of the decision made:
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> > A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.

In this case, Verburg knew that a complaint had been made and that the complaint alleged non-payment of overtime wages. On February 17, 1998, the Director notified Verburg of the complaint. The communication reads in part:

> **RE: FORMER EMPLOYEE - RUPERT G. DAVY**
>
> . . . The complainant alleges to have been in your employ and claims **overtime wages** remain outstanding after termination. . . .
>
> If you disagree with the allegations as contained in the complaint, your **written response**, together with payroll documentation, is invited to substantiate your position.

Verburg's argument relies on the assumption implicit in it that the Director is obligated to provide a person under investigation with proof of the allegation made in the complaint or with particulars of the complaint. As indicated above, the statute requires the director to make a reasonable effort to give the person under investigation an opportunity to respond. That statutory obligation was met in this case. Verburg was told the name of the complainant, the nature of the claim and invited to respond. There is no additional obligation in the *Act* to establish a *prima facie* case before requesting a response or to provide particulars of the complainant's position at the initial stages of the investigation. There will be cases where the nature of the information received during the investigation

will require the Director to provide a party whose interest may be adversely affected by that information with an opportunity to comment on it: see *Delage*, BC EST #D420/98. That is because the level of procedural fairness that should be afforded a party will become greater as the character of the function of the Director takes on more of the attributes of judicial decision-making.

But no such requirement arises in this case. At the early stages of an investigation the function of the Director is almost exclusively investigative. Verburg's refusal to co-operate in the investigation or to provide records or a response guaranteed there would be no conflicting material or information. Verburg's assertion that they had done a "self audit" and found nothing owing, while at the same time refusing to produce their records, does not create any additional obligation than the one found in Section 77 of the *Act* and met by the Director. The situation in which Verburg finds itself was entirely of its own making.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 9, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal